

SHAHI (Migration) [2016] AATA 4976 (7 November 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Rajib SHAHI
CASE NUMBER:	1607443
DIBP REFERENCE(S):	BCC2014/1431821
MEMBER:	Kira Raif
DATE:	7 November 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 100 (Spouse) visa.

Statement made on 07 November 2016 at 4:35pm

CATCHWORDS

MIGRATION – Cancellation – Partner (Migration (Class BC) – Subclass 100 (Spouse) – incorrect information – change of circumstances – new relationship – application to sponsor another woman – relationship dates overlap – lack of mutual commitment to a shared life – credibility issues – untruthful evidence – false divorce documentation – applicant's severe mental state – offer to postpone hearing – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 104, 107, 109
Migration Regulations 1994 (Cth), r 1.15A

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 100 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The applicant is a national of Nepal, born in June 1985. He travelled to Australia in October 2005 holding a Student visa. In July 2008 the applicant applied for a Partner visa on the basis of his relationship with the sponsor, Ms Yu Cao. He was granted the permanent Partner visa in January 2011. In June 2013 the applicant sponsored another person, Ms Chanjing Ning, for a Partner visa, claiming their committed relationship commenced in December 2010. The applicant produced a divorce certificate showing he divorced Ms Yu Cao in April 2011.
3. In August 2014 the applicant was issued with a Notice of Intention to Consider Cancellation (NOICC) on the basis that the applicant breached s. 104 of the Act. The applicant provided his response to the NOICC. On 2 March 2015 the delegate decided to cancel the Partner visa held by the applicant and in July 2015 the Tribunal (differently constituted) affirmed the decision to cancel the applicant's visa. The applicant sought judicial review of the Tribunal's decision and the matter has been remitted to the Tribunal for reconsideration.
4. The applicant appeared before the Tribunal on 2 November 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's former manager and a friend. The applicant was represented in relation to the review by his registered migration agent.
5. The Tribunal acknowledges the applicant's evidence concerning his health condition. The Tribunal offered to postpone the hearing but the applicant preferred to proceed. He did not appear to have any difficulties presenting evidence and responding to the questions posed to him. The applicant was invited to seek breaks or an adjournment if he felt uncomfortable at any time in the course of the hearing and had not done so. He was assisted by a migration agent throughout the hearing and had a support person present. In such circumstances, the Tribunal is satisfied the applicant was given a genuine opportunity to appear and present evidence.
6. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 Notice, being the manner particularised in the Notice, and if so, whether the visa should be cancelled. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

Relevant law

7. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
8. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the

alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise.

Did the notice comply with the requirements in s.107?

9. Section 107 is only engaged if the Minister or delegate considers that the visa holder has not complied with one of the provisions mentioned in s.107(1). It is only then that the Minister or delegate is entitled to give notice to the visa holder under s.107. Therefore, if a notice is to be given under s.107, the Minister or delegate must have reached a state of mind where they consider that the visa holder has not complied with one or more of the relevant provisions.
10. The Tribunal has considered the validity of the NOICC. The Tribunal is satisfied that it contains sufficient particulars to enable the applicant to identify and address the issues and also that the delegate had reached the necessary state of mind to engage s.107. The Tribunal is satisfied that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

11. The applicant provided to the Tribunal a copy of the primary decision record, which indicates that the applicant was issued with the NOICC. The non-compliance identified and particularised in the s.107 notice was non-compliance with s. 104 of the Act in the following respects:
 - a. On 28 July 2008 the applicant applied for the Class BC Subclass 100 Spouse visa. He stated at Question 43 of Form 47SP that his partner's name was Yu Cao [the sponsor].
 - b. In response to questions 69 and 70 of the form, the applicant stated that he and the sponsor committed to the relationship in October 2007 and began a spouse relationship in May 2007.
 - c. In response to Question 18 of Form 80 the applicant referred to his partner as Yu Cao.
 - d. In a statutory declaration dated 3 June 2010 the applicant stated that he was in a committed and exclusive relationship with Yu Cao, that their relationship was genuine and continuing and that they live together.
 - e. In April 2011 the sponsor notified the Department that upon her return to Australia in February 2011 she found the applicant living with another woman. The sponsor advised that the applicant requested a divorce.
 - f. On 25 June 2013 Ms Chenjing Ning applied for a Partner visa. The applicant submitted the Sponsorship form 40 in which he stated that he and Chengjing Ning met in September 2010 and committed to a shared life together to the exclusion of all others on 20 December 2010. The same information was provided by Ms Ning in response to questions on the application form 47SP.
 - g. Ms Ning stated in response to Question 59 of the application from 47SP that since they committed to a shared life together to the exclusion of all others they had not lived separately and apart for any period of time.

- h. The applicant provided to the Department a Divorce order dated 5 April 2011 relating to his divorce with Yu Cao.
 - i. The applicant provided a declaration in support of Ms Ning's application. In it he stated that he and Ms Ning started their relationship on 10 October 2010, travelled to Nepal together the following day and had lived together since they returned to Australia.
- 12. The NOICC refers to s. 104 of the Act which required the applicant to inform an officer in writing of any change of circumstances and correct answers. The NOICC notes that throughout his application for the Partner visa, the applicant claimed to be in a genuine and committed ongoing relationship, to the exclusion of all others, with Yu Cao and his relationship with Chanjing Ning was a relevant change of circumstances which the applicant failed to notify.
- 13. In response to the NOICC the applicant provided a Letter of Support from Wolli Creek Family Practice stating that he was suffering from Adjustment Disorder with depressed mood and suicidal thoughts and had been on antidepressant medication. The applicant also provided a discharge summary from NSW Health, a detailed psychiatric report from Dr Zhang which refers to the applicant suffering from depression, insomnia, suicidal behaviour, frustration and agitation, and character references. On 2 March 2015 the delegate decided to cancel the visa held by the applicant.
- 14. In his written submission to the present Tribunal the applicant claims that the facts of his case are complex and that the term 'relationship' is not precise and means different things to different people and it is hard to pinpoint when relationships start and end. The Tribunal acknowledges that evidence but also notes that the term 'relationship' is commonly used and generally well understood by most people. Significantly, the various questions on the migration forms go beyond the mere reference to the word 'relationship' and refer to matters such as mutual commitment to a shared life to the exclusion of all others, the existence of a genuine and continuing relationship, living arrangements, etc. The term 'relationship' is not mentioned in abstract and it is the information the applicant gave in response to these questions on the various forms that is an issue.
- 15. The Tribunal is mindful that when Ms Ning applied for the Partner visa, she claimed to have commenced her relationship with the applicant in December 2010. The applicant had been aware of that application, he had completed the sponsorship form and had agreed with Ms Ning's assessment that their committed and exclusive relationship commenced in December 2010. His answers given in the sponsorship form in relation to when the relationship with Ms Ning commenced are recorded in the NOICC. These indicate that the applicant himself believed that his relationship with Ms Ning (whatever he believed 'relationship' to mean) commenced in December 2010. Presumably, if Ms Ning's application contained false or misleading information, the applicant would not have acted as a sponsor and would not have provided that information in the sponsorship form. Thus, to now state that the date this relationship commenced cannot be determined precisely is, in the Tribunal's view, disingenuous. The applicant had no difficulty making that assessment when Ms Ning's visa application was lodged.
- 16. According to the decision record, provided by the applicant to the Tribunal, the relevant questions on the application form were very specific. Thus, question 70 of the application form 47SP expressly defines a spousal relationship as a relationship between the couple who have a mutual commitment to a shared life to the exclusion of any other spouse relationship or interdependent relationship'. The applicant claimed to have such a relationship with Ms Cao when he made his visa application. The primary decision record indicates that when making the sponsorship in relation to Ms Ning's application, the

applicant stated in response to Question 24 that he and Ms Ning committed to a shared life together to the exclusion of all others in December 2010. The applicant also provided a statement in which he claims that from the time he met Ms Ning, they started a relationship in October 2010 and he knew 'she was the one for him'. These answers imply a committed relationship between the applicant and Ms Ning, rather than a mere sexual relationship in his wife's absence, as the applicant now suggests.

17. The applicant submits to the present Tribunal that he started his relationship with Ms Ning when the sponsor was out of the country to 'fill the void' while his wife was away and he regrets his infidelity. However, in his oral evidence to the present Tribunal the applicant stated that his relationship with Ms Ning started around October or November 2010 and that they loved each other and that he was committed to that relationship. That evidence contradicts the apparent suggestion in his written claims that he did not have a committed relationship with Ms Ning but was simply using that relationship in Ms Cao's absence. In the Tribunal's view, the applicant's written claim is nothing more than an attempt to diminish the nature of the applicant's relationship with Ms Ning. The fact that he sponsored her for the Partner visa, claiming they had a mutual commitment to a shared life to the exclusion of all others, and had established all the indicia of a spousal relationship set out in r. 1.15A, suggests that the applicant's relationship with Ms Ning was much more significant than 'filling the void' in his wife's absence and that was not a committed partner relationship. As noted above, the applicant expressly claimed to be in a committed relationship with Ms Ning from late 2010 when he sponsored Ms Ning for the Partner visa. The primary decision record refers to the information the applicant provided on the sponsorship form when he referred to having committed to a shared life together with Ms Ning to the exclusion of all others from December 2010 and a written statement which he provided in support of that application in which he claims that his relationship with Ms Ning started on 10 October 2010 and that he knew straight away she was the one for him.
18. The Tribunal considers it significant that in his oral evidence to the first Tribunal, the applicant confirmed that his relationship with Ms Cao ended by April 2010. The applicant informed the present Tribunal that he was 'too scared' to provide different information to the first Tribunal. It is unclear what he was scared of and even if for whatever reason the applicant could not present what he now claims to be correct information in oral evidence to the first Tribunal, he had every opportunity to correct that information after the hearing and failed to do so. In his written submission to the first Tribunal dated 15 July 2015 the applicant stated that the relationship continued until 9 June 2010 when the sponsor went to China and after the sponsor's arrival in Australia, they agreed on a divorce. The applicant presented to the first Tribunal a hospital report which states that he had a suicide attempt in 2010 in the context of relationship breakdown with his ex-wife. All these matters suggest that the applicant's relationship with Ms Cao ended by June 2010.
19. The applicant's oral evidence to the present Tribunal is that he met Ms Cao in 2006 at work. Soon after they met, they started to live together and shared all their bills. On his birthday they decided to get married. They travelled to Nepal together after he was granted the subclass 309 visa and their relationship was good. After Ms Cao was assaulted, they reported the matter to the police and subsequently won the court case. Because of the assault, the relationship changed as Ms Cao had been traumatised and affected by the assault. She decided to return to China to stay with her parents and suggested he should visit her the following year. When he visited her in China, there was another man present and he was suspicious, even though Ms Cao introduced him as a friend. He later found intimate pictures and videos of the sponsor with that man. When he saw that, he tried to commit suicide but a friend stopped him. The applicant said he confronted the sponsor and she told him she did not love him and he was not what she wanted in a relationship. In the Tribunal's view, that suggests that the applicant's relationship with the sponsor was no longer genuine and mutually committed and to the exclusion of all others.

20. Significantly, the applicant told the Tribunal that when the sponsor left in June 2010, she told him she would not be coming back but would assist him with the paperwork because of what he had gone through. The applicant said that at the airport, the sponsor told him that she hoped he would have a good life and while he hoped the relationship would reignite, Ms Cao believed she was doing him a favour and just left. This offers very strong evidence that by the time of her departure from Australia, the relationship had ended and Ms Cao had no commitment to the present relationship. The applicant said that Ms Cao was away from June 2010 and returned in 2011. He said that in that period he emailed her a number of times but she only responded once or twice and told him that she hoped he was well but had no other commitment. She told him that relationship was not important to her and her career was more important. These matters also suggest that by June 2010 when Ms Cao left the country, she had no commitment to her relationship with the sponsor. Even if the applicant was hopeful of a continued relationship with Ms Cao, the Tribunal is of the view that Ms Cao had no commitment to the relationship by the time she left Australia in June 2010.
21. The Tribunal finds that the applicant's evidence to the previous Tribunal and in response to the NOICC, all of which points to his relationship with Ms Cao ending by June 2010, contradicts his written submission to the present Tribunal in which he claims the relationship lasted until 2012. In his written submission to the present Tribunal the applicant claims that when the sponsor left Australia in June 2010, he did not consider that the relationship had broken down irretrievably and neither he nor the sponsor terminated the relationship. The Tribunal notes that the applicant's evidence to the present Tribunal contradicts his oral evidence to the first Tribunal when he claimed the relationship was at an end by April 2010 and his written evidence to the first Tribunal when he stated the relationship ended by June 2010 when the sponsor left Australia, as well as the information contained in the medical reports. The Tribunal does not accept his explanation that he was too scared to provide a different answer to the first Tribunal about the date the relationship ended. Not only was the applicant sufficiently capable of responding to the Tribunal's questions, there is no indication that this information was at any time corrected following the Tribunal hearing. In the Tribunal's view, if the information the applicant gave to the first Tribunal was incorrect, he had ample opportunity to correct that information following the hearing. The Tribunal is also mindful that the applicant was represented by a migration agent throughout the process. Thus, the Tribunal does not accept the applicant gave incorrect information to the first Tribunal about the relationship ending in April 2010 or by the time of the sponsor's departure from Australia in June 2010. It is of considerable concern to the Tribunal that the applicant now wishes to create a different timeline and a different version of events and the Tribunal is not satisfied the applicant is being truthful in these assertions.
22. The applicant's evidence to the Tribunal is that after the sponsor returned to Australia in early 2011, they continued a sexual relationship and continued to do things together and he kept her bills and that she kept 'coming back'. That contradicts the applicant's evidence that once Ms Cao returned from China, she found him with another woman and wanted a divorce. In any case, the Tribunal does not consider that the fact that the applicant and the sponsor were spending some time together and the applicant was providing financial support to Ms Cao is sufficient to establish they maintained a spousal relationship. He may have done so because of the relationship or as a means of ensuring he would obtain the permanent visa. The applicant's oral evidence to the Tribunal is that he was committed to another person while Ms Cao also had another relationship in China. The Tribunal is not satisfied that either party was committed to a relationship and in the absence of a mutual commitment to a relationship to the exclusion of all others, the Tribunal is not satisfied that the applicant and Ms Cao continued to be spouses since June 2010.
23. The Tribunal has formed the view that the applicant has not been truthful in his evidence to the present Tribunal and that he is deliberately attempting to misrepresent the nature of these relationships to assist with the visa issues. The Tribunal prefers the applicant's

evidence to the first Tribunal that his relationship with the sponsor ended around April 2010 and no later than June 2010 when the sponsor left Australia. The Tribunal is mindful that this is consistent with the information the applicant gave in relation to Ms Ning's sponsorship. The Tribunal finds that the applicant's relationship with Ms Cao ended no later than 2010.

24. The Tribunal finds that
- a. The applicant claimed in response to various questions on the application forms that he was in a spousal relationship with Ms Cao.
 - b. The applicant was granted a Partner visa on 21 January 2011 on the basis of his spousal relationship with Ms Yu Cao.
 - c. In June 2013 Ms Ning applied for a Partner visa and the applicant was the sponsor in that application. He provided information on the Sponsorship Form 40SP that he and Ms Ning committed to a shared life to the exclusion of all others in December 2010.
25. The Tribunal finds that when the applicant sought the Partner visa on the basis of his relationship with Ms Cao, he provided answers on the application form that his relationship with Ms Cao was genuine and ongoing and to the exclusion of all others. He stated that his relationship with Ms Cao had not ceased and that they live together. The Tribunal finds that by the time the applicant started the relationship with Ms Ning around October 2010, his circumstances changed because his relationship with Ms Cao had ceased, because they were no longer in a committed spousal relationship to the exclusion of all others and because they were no longer living together. The Tribunal finds that the applicant's answers to questions on the application form concerning the nature of his relationship with Ms Cao were incorrect in the new circumstances. The Tribunal finds that the applicant failed to inform an officer in writing of the new circumstances and of the correct answers.
26. Even if the Tribunal were to accept the applicant's evidence that his relationship with Ms Cao ended in 2012 and not in 2010 (a claim the Tribunal does not accept), the Tribunal notes that in response to question 70 of the application form 47SP the applicant stated that he was in a spousal relationship with Ms Cao and that there was a mutual commitment to a shared life to the exclusion of any other spouse relationship or interdependent relationship and such relationship had not ceased. The applicant concedes that his relationship with Ms Ning started in late 2010 and the applicant's oral evidence to the Tribunal is that it was a committed relationship. Therefore, the applicant's relationship with Ms Cao, even if it continued to exist, was not to the exclusion of any other spouse relationship or interdependent relationship. By the time the applicant commenced a committed relationship with Ms Ning, his circumstances had changed so that an answer he gave on the application form became incorrect.
27. The Tribunal finds that the applicant failed to notify of changes in circumstances and failed to comply with s. 104 of the Act. The Tribunal finds that there was non-compliance by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

28. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).

29. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Whilst these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers'.

The correct information

30. The applicant conceded in his evidence to the first Tribunal that his relationship with Ms Cao ended by April 2010. His written submissions indicate that relationship ended by June 2010. His evidence to the present Tribunal is that the relationship lasted until 2012 and it was not until the domestic dispute in 2012 that the relationship really ended. For the reasons stated above, the Tribunal has formed the view that the relationship ended by June 2010 and by the end of 2010 his relationship with Ms Cao was not to the exclusion of all others. This was three to four months before the applicant was granted the permanent Partner visa. The correct information is that prior to the grant of the visa, the applicant ceased to be the spouse of Ms Cao and was no longer in a spousal relationship to the exclusion of all others with the sponsoring partner.
31. In his submission to the first Tribunal dated 15 July 2015 the applicant claims that his declaration of 6 June 2010 was genuine and correct on the day it was prepared as the applicant and the sponsor were in a genuine relationship and were living as husband and wife. The Tribunal is mindful that this contradicts the applicant's oral evidence to the first Tribunal that his relationship ended by April 2010, that the sponsor had left Australia and the information he provided in his divorce application. For various reasons set out above, the Tribunal does not accept that all of that information was untrue and that it is only the information given to the present Tribunal that is credible and truthful. In any case, the Tribunal notes that the basis for the cancellation is not the provision of false information in a statutory declaration but rather the applicant's failure to inform of the changes in circumstances before his visa was granted.
32. In his submission to the Tribunal of 26 October 2016 the applicant notes that despite the divorce application, his relationship with the sponsor continued for a significant period and they continue to have an intimate relationship until 2012 and he paid Ms Cao's bills. The Tribunal does not consider that the existence of a sexual relationship defines a spousal relationship. Whether or not the applicant and Ms Cao continued to have an intimate relationship or had undertaken some activities together and even if the applicant provided financial support to the sponsor. For the reasons stated above, the Tribunal has found that by June 2010 the applicant and Ms Cao no longer had commitment to their relationship and did not view their relationship as being an exclusive one and they were no longer spouses. The correct information is that by February 2011 when his visa was granted, the applicant's relationship with the sponsoring spouse, if it existed, was not to the exclusion of all others.

The content of the genuine document (if any)

33. This is not relevant in the present case.

Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

34. The applicant was granted the Partner visa because he was found to have been in a genuine and exclusive relationship with Ms Cao. It is a key criterion for the grant of the

Partner visa and there is nothing to suggest the applicant relied on any of the alternative basis, such as family violence, the death of the partner or responsibilities in relation to children.

35. The applicant's evidence is that his relationship with Ms Ning started in late 2010. He claims in his evidence to the present Tribunal that he was in a relationship with both Ms Cao and Ms Ning and it was a complex matter. For the reasons stated above, the Tribunal is of the view that the applicant's relationship with the sponsor ended by late 2010 and before he was granted the visa. However, even if the applicant's claims are to be believed, the Tribunal is of the view that the applicant's relationship with Ms Ning implies that his relationship with Ms Cao was not to the exclusion of all others. It is very likely, in the Tribunal's view, that if the applicant had declared the existence of a committed relationship with Ms Ning by the time he was granted the Partner visa in February 2011, he may not have been able to meet the definition of the term 'spouse' and may not have been granted the visa. The Tribunal finds that the decision to grant the visa was based, wholly or partly, on incorrect information.

The circumstances in which the non-compliance occurred

36. In his submission to the delegate and the first Tribunal, the applicant stated that he failed to provide correct information due to his mental illness and his poor mental state. The applicant provided several medical reports and other evidence concerning his mental well-being. The applicant claims that he was suffering from depression and suicidal ideations and was hospitalised following a suicide attempt when his relationship broke down. The applicant claims that his judgment was impaired and his condition affected his behaviour. The applicant claims there is a compelling reason why his visa should not be cancelled.
37. The Tribunal has considered the medical evidence presented by the applicant. The evidence indicates that the applicant was admitted to hospital in March 2010 as he threatened suicide. The Tribunal accepts that at the time the applicant's mental health may have been affected but the medical evidence does not establish that the applicant's capacity for decision-making had been impaired. Other medical reports referring to his upper respiratory tract infection and cardiac observation do not establish, in the Tribunal's view, the applicant's incapacity or inability to communicate with the Department. The applicant presented additional medical evidence to the first Tribunal. Many of these reports are recent documents dated 2014 or later. For example, the report from Dr Taylor indicates that he first saw the applicant in April 2015 and the Tribunal is not satisfied Dr Taylor is able to establish the applicant's state of mind, or incapacity, before February 2011. The Tribunal has also considered the medical reports from Dr Zhang. Dr Zhang refers to the applicant's circumstances and has diagnosed that he suffers from major depression. There is nothing in Dr Zhang's report to indicate that the applicant's condition rendered him incapacitated and incapable to comply with his legal obligations.
38. Essentially, having regard to the various medical reports, the Tribunal is prepared to accept that the applicant's mental state was affected following the breakdown of his relationships and that the applicant had attempted suicide and was hospitalised. The Tribunal accepts that the applicant had been prescribed medication to deal with his condition. However, the Tribunal is not convinced that the presented evidence supports the applicant's claim that his condition rendered him incapable of engaging with the Department.
39. As noted above, the applicant's evidence to the present Tribunal is different because the applicant does not claim he failed to advise of the change of circumstances due to his incapacity. Rather, he claims there was no change in his circumstances because his relationship with Ms Cao continued until 2012. For the reasons set out above, the Tribunal has rejected that claim.

40. In his submission to the first Tribunal dated 15 July 2015 the applicant claims that he never intended to mislead, that he was taken advantage of and had been a victim. He claims that he never had the intention to secure his place in Australia and if that was the case, he could have applied for the Australian citizenship as he had been living in Australia for ten years. The Tribunal considers this to be an odd statement from the applicant's representative, given that the Australian citizenship is not based merely on the length of stay in Australia and ten years of Australian residence, most of which as a temporary resident, would not have entitled the applicant to the grant of the Australian citizenship.

The present circumstances of the visa holder

41. The applicant refers to his employment in Australia and he provided letters of support from his employer to the delegate. In oral evidence to the Tribunal the applicant stated that he has been living in Australia for eleven years, is used to the Australian culture and lifestyle. He has been working and has contributed to the Australian economy as a tax payer. The applicant refers to his employment as a duty manager where he supervises and trains staff. The applicant spoke about the contribution he has made to his employer, including through his work with 'young kids' at the club and introduction of new programs. The Tribunal accepts that the applicant is fully settled in Australia and that he is gainfully employed in Australia and contributes to his employer and pays taxes.
42. The applicant referred to having made friends in Australia and having close connection, including being a god-father to a friend's child. The applicant claims that he wants to be part of that child's life. The Tribunal accepts that evidence. The applicant spoke about other relationships he has formed in Australia and the Tribunal accepts that the applicant has formed a network of friends in Australia. The Tribunal acknowledges evidence from third parties in support of the applicant. The applicant outlined the social activities he had engaged in and the Tribunal accepts that the applicant has fully adopted to the Australian way of life.
43. The applicant informed the first Tribunal that his family in Nepal had been affected by the earthquake and that he felt obliged to provide financial support to his family. The applicant refers to the collapse of his house and the deaths of his aunt, nephews and others. He submits that he would suffer considerable hardship if forced to return to Nepal before his home is rebuilt and the difficult situation has passed, particularly in light of his psychological condition. The Tribunal accepts that the applicant wished to provide financial support to his family in Nepal, although he claims he had not done so for a long time. The applicant's evidence to the first Tribunal is that his family did not request financial support and none has been provided for several months. In his oral evidence to the Tribunal the applicant stated that he sent \$300 to his family early in 2016 and \$2500 in late 2016. The applicant does not claim to have provided any other financial support to his parents. The applicant informed the Tribunal that the family home has been rebuilt and if he is to return to Nepal, he would live with his parents and support his parents. The Tribunal is satisfied that the applicant will have accommodation if he has to return to Nepal.
44. The applicant described the mental health issues he had since childhood and he claims that he would not have the same level of health care in Nepal that he has in Australia and that would adversely affect his mental state. The applicant has not presented probative evidence to support that assertion. There is little evidence before the Tribunal on what health care would be available to the applicant and what would be required for him to be able to access such health care. On the limited information before it, the Tribunal is not satisfied the applicant would be denied adequate healthcare in Nepal, even if the level of care may not be the same as what he is used to at present. In his written submission the applicant refers to Mr Taylor's report that a negative AAT decision would have a negative impact on his mental health and his ability to work and support his parents. The Tribunal is prepared to accept that

a cancellation of the visa, and the possibility of having to depart a country where the applicant has been a long-term resident, may adversely affect the applicant's mental health and would cause a degree of hardship to the applicant but the Tribunal is not satisfied the applicant would be unable to receive treatment in Nepal.

45. The applicant's evidence to the Tribunal is that the society does not recognise mental health issues and even his family does not accept his condition and does not support him and nobody else will. The Tribunal is prepared to accept that the applicant would receive a greater level of support in Australia than he would in Nepal.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

46. The applicant informed the previous Tribunal that his relationship with Ms Cao ended by October 2010. He told the present Tribunal that information was incorrect and that relationship ended in 2012. The Tribunal has formed the view his evidence to the current Tribunal, rather than the first Tribunal, was false. The applicant's evidence indicates that the applicant provided false or misleading information to the Tribunal concerning the matters that formed the basis of the cancellation.
47. There is nothing before the Tribunal to indicate the applicant failed to comply with his obligations under the Act in any other manner.

Any other instances of non-compliance by the visa holder known to the Minister

48. There are no other instances of non-compliance known to the Tribunal.

The time that has elapsed since the non-compliance

49. The applicant had been granted the Partner visa in January 2011. His obligation under s. 104 applies to changes in circumstances before the visa is granted. Nearly six years have elapsed since the non-compliance.

Any breaches of the law since the non-compliance and the seriousness of those breaches

50. There is no evidence that there have been other breaches of the law since the non-compliance.

Any contribution made by the holder to the community

51. The applicant spoke about his employment in Australia and the contribution that he made to his employer and the employees he works with. The applicant claims he contributes through the payment of taxes. The applicant said that he gives to charity and helps feed the homeless and he has made donations and wants to be an example to the community. The Tribunal accepts that evidence.
52. The Tribunal has also had regard to the considerations set out in the PAM.
53. As noted above, the correct information concerned the nature of the applicant's relationship with the sponsor and that information was central to the visa grant. The applicant does not claim that he would have met any of the exceptions for the grant of the visa (such as family violence, the death of the partner, obligations in relation to children, etc) and if it was known that his relationship with the sponsor had ended, it is unlikely that the applicant would have been granted the visa.

54. There are no persons in Australia whose visa would, or may, be automatically cancelled under s. 140 of the Act
55. The applicant does not claim, and has not presented probative evidence to satisfy the Tribunal, that the visa cancellation may result in Australia breaching its international obligations.
56. The applicant told the Tribunal that he comes from a religious family and he is the first person in his family who has gone overseas. If he has to return, he would live in shame because people would see that he failed. The applicant said that an easy way out would be for him to commit suicide. The Tribunal does not consider these matters give rise to Australia's obligations. Neither is the Tribunal satisfied that the applicant would be considered to be a failure because he has not been able to gain permanent residence in Australia. In the Tribunal's view, most people would recognise that obtaining residence in another country is a complex process and one's failure to gain permanent residence need not be considered as a failure.
57. The applicant referred to his upbringing and family circumstances and the traumas of his childhood, including violence from his brother and bullying at school. The Tribunal is prepared to accept that evidence. The Tribunal is not convinced that such matters would create significant problems for the applicant if he is to return to Nepal. The applicant is an independent adult and need not have contact with his brothers if he does not wish to. His evidence to the Tribunal is that his brothers had changed and wanted to make contact with him, which he refused to do. The Tribunal is not convinced that the applicant would be adversely affected if he were to return to Nepal as a result of this past relationship with his family.
58. The Tribunal has considered the evidence of the applicant's two witnesses, who had given character references. The Tribunal accepts that they believe the applicant to be a good and responsible person. The Tribunal also acknowledges the written character references that had previously been submitted. The Tribunal also acknowledges that the applicant has expressed remorse for his past conduct.

Other

59. The applicant confirmed in oral evidence to the Tribunal that he provide a divorce certificate to the Department when sponsoring Ms Ning. The primary decision record indicates that the applicant submitted a divorce order dated 5 April 2011. The applicant claims in his oral evidence to the Tribunal that he provided an incorrect date for separation in his divorce application made to the Federal Magistrates Court because he wanted to get the divorce papers earlier. If that is the case, then the divorce certificate is a bogus document because it was obtained on the basis of false or misleading information. By submitting a bogus document to the Department, the applicant may have breached s. 103 of the Act.
60. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal has found that the applicant breached s.104 of the Act by failing to advise the Department of the changes in circumstances. The Tribunal has found that grounds exist for cancelling his visa. The Tribunal has found that the applicant's relationship with the sponsoring spouse had ceased and the applicant commenced a relationship with another person before he was granted the Partner visa. He failed to provide that information to the Department. Even if the applicant's relationship with the sponsoring spouse had not ceased, as the applicant now claims (a claim the Tribunal does not accept), the Tribunal would find that the applicant breached s. 104 of the Act because his relationship with the sponsor was not to the exclusion of all others. The Tribunal finds that the information was central to the assessment

of whether the applicant continued to be the spouse of the sponsor for the purpose of cl. 100.211 and central to the decision to grant the applicant the Partner visa.

61. The Tribunal has rejected the applicant's claims that his failure to inform of the change of circumstances was caused by his mental condition. While the Tribunal accepts that such a condition exists, the Tribunal is mindful that the applicant had the capacity to engage in many activities, including work, starting and maintaining another relationship and other activities of daily life. The Tribunal is not satisfied that the applicant's medical condition rendered him incapable of correcting the information. The Tribunal has formed the view that the applicant deliberately withheld information from the Department in order to obtain the permanent visa. He did so knowingly and with the full intention to mislead because he was aware that if the correct information was known, he would not be granted the permanent visa.
62. The Tribunal accepts that a lengthy period of time has passed since the non-compliance. The Tribunal accepts that the applicant is settled in Australia, that he has been living in Australia for over eleven years and has made some contribution to Australia. The Tribunal accepts that significant hardship would be caused to the applicant if his visa is cancelled and that his employment opportunities may be more limited if he is required to depart Australia. The Tribunal accepts that the applicant has been gainfully employed and has formed close friendships in Australia. The Tribunal is prepared to accept that the applicant's mental state may be adversely affected by the cancellation of the visa, although the applicant has not satisfied the Tribunal that he would not be able to access adequate health care in Nepal. The Tribunal accepts the applicant is recognised as a valuable employee who contributes to the business and the Tribunal accepts that his friends and colleagues view him as a good friend and a good person. These factors suggest that the visa should not be cancelled.
63. Against these considerations, the Tribunal has formed the view that the applicant has been deliberately untruthful in his dealings with Immigration when he failed to disclose a new relationship. The Tribunal has formed the view that the applicant has been deliberately untruthful in his evidence to the present Tribunal when he claims the relationship with the sponsor lasted until 2012, which contradicts his earlier evidence. The Tribunal has found that the divorce certificate which the applicant relied on in his dealings with Immigration was a bogus document as the applicant claims he provided incorrect information to the Federal Magistrates Court in relation to the date of his separation. The applicant also claims he provided false information to the first Tribunal in relation to when his relationship with Ms Cao ended, although the Tribunal has formed the view that it is his evidence to the present Tribunal on that issue, rather than his evidence to the first Tribunal, that was false or misleading. The Tribunal has formed the view that the applicant had persistently been untruthful in his dealings with authorities when he determined that it suited his circumstances.
64. The Tribunal places significant weight on the fact that the correct information would have rendered the applicant ineligible for the grant of the visa. Essentially, the applicant was granted the Partner visa on the basis of the relationship which ceased to exist and certainly ceased to be to the exclusion of all others, which is one of the elements of the definition of the 'spouse' which the applicant had to meet for visa grant. The Tribunal is of the view that the information which the applicant withheld was central to the grant of the visa and the applicant was not entitled to be granted the Partner visa in the circumstances where he was no longer in a spousal relationship with the sponsoring partner. In the Tribunal's view, that consideration outweighs other matters.
65. Having considered the circumstances as a whole, the Tribunal finds that the visa should be cancelled.

Conclusion

66. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

67. The Tribunal affirms the decision to cancel the applicant's Subclass 100 (Spouse) visa.

Kira Raif
Senior Member